

Dear Subscriber,

Case Law Update:

WCAB Rules That Lien Claimant Has Burden of Proof in Establishing Reasonableness of Charges.

Jiminez v. Galaxy Shade Systems (2007)

[cite pending]

In *Jiminez v. Galaxy Shade Systems*, the WCAB reversed a trial judge who found in favor of a lien claimant on the basis that the defendant failed to challenge the reasonableness and necessity of services rendered and further failed to establish that the lien claim was unreasonable.

In reversing the trial judge, the WCAB held that the burden of proof rests upon the party attempting to establish an affirmative. Specifically, the burden of proof rests with the lien claimant to establish that the lien being litigated is reasonable, as the reasonableness of charges is a portion of a lien claimant's prima facia case.

The WCAB cited the recent Fourth District Court of Appeal case of *Zenith v. WCAB (Capi)*, (2006) 71 Cal. Comp. Cases 374, where the Court noted that 'the lien claimant bears the burden of establishing the... entitlement to benefits and the reasonable value of services.' Further, the WCAB clarified their prior holding in *Kuntz v. Golden Eagle Ins. Co.*, (2002) 67 Cal. Comp. Cases 1588, and stated that though prima facia evidence of the reasonableness of a lien can be established by submitting billing as evidence, this is one of many factors to be considered and, even when unrebutted, must be considered separately for reasonableness.

The Jiminez case is in accord with a prior holding from May 2007 from the WCAB, *Pfeffer v. Fisher Construction*.

Two Year (104 week) Limit on Temporary Disability Commences Upon Date of First Actual Payment of Temporary Disability.

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Hawkins v. Amberwood Products (2007)

[cite pending]

The WCAB held that the limitation on temporary disability to be payable for a total of up to 104 compensable weeks within a period of two years does not begin until the first payment of temporary disability is made.

In the Hawkins case, the applicant was first temporarily disabled on July 17, 2004. The Employment Development Department (EDD) initially provided indemnity to the applicant and continued paying indemnity to the applicant through May 2, 2005. Thereafter, defendant paid to the applicant the difference in the EDD rate and temporary disability for the periods that EDD provided benefits, and commenced payment of temporary disability beginning May 3, 2005 and continuing through July 14, 2006.

Based on the first payment of temporary disability by defendant on May 3, 2005, the WCAB held that the applicant was entitled to ongoing temporary disability beyond July 14, 2006. The WCAB reasoned that the plain language of Labor Code 4656(c)(1) provides that the 104 week period begins at the time that temporary disability is first paid, not when it is first owed. As a result, the defendant's liability continued for up to 104 weeks within two years of the first payment on May 3, 2005, not the first date owed.

First District Court of Appeal Rules that ACOEM Does Not Apply to Surgical Recommendations on Chronic Spinal Conditions, Parties Ordered to Utilize Second Opinion Spinal Surgery Procedure.

In the unpublished case of Liang v. WCAB (2007), *[cite pending]*, the Court of Appeal, First District, held that in a claim involving a chronic back condition ACOEM Guidelines do not apply. The Court further remanded the case to the WCAB for the parties to obtain a second surgical opinion pursuant to Labor Code Section 4062(b).

In this case, a dispute as to the need for spinal surgery was timely raised by the defendant. The parties reached agreement on an Agreed Medical Evaluator to provide a second opinion as to the need for the surgical procedure. Thereafter, the applicant rescinded his agreed relating to the evaluator though, nonetheless, attended the scheduled evaluation. The AME found there was no need for the requested procedure. Based thereon, the defendant denied authorization for the procedure. Ultimately, the WCAB followed the opinion of the former QME/AME. Applicant appealed and the Court of Appeal, First District, held that the parties were required to follow the second opinion procedures and request that the Administrative Director randomly appoint a physician to determine the need for

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spinal surgery as there was no evaluator agreed to by the parties. The Court further held that the ACOEM Guidelines were not presumptively correct in this matter because the Guides, by their own terms, apply only to treatment during the first three months following an injury.

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